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DO SACRED COWS MAKE THE BEST HAMBURGERS? THE LEGAL REGULATION OF RELIGIOUS SLAUGHTER OF ANIMALS

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I INTRODUCTION

There is now a significant body of literature demonstrating the close link between religious beliefs and the choices consumers make in their purchasing decisions.¹ Studies into the relationship between religion and consumer preferences also demonstrate the formative role that religion plays in influencing the choice of food consumption.²

In an explicitly multicultural society such as Australia, those cultural and religious preferences and practices of consumers are specifically recognised by the Commonwealth government's current Multicultural Policy.

That policy affirms:

Multiculturalism is in Australia's national interest ... It enhances respect and support for cultural, religious and linguistic diversity... It also allows those who choose to call Australia home the right to practice and share in their cultural traditions and languages within the law and free from discrimination.³

Many religious traditions contain requirements relating to the preparation and consumption of food. In particular, the Jewish and Islamic religious traditions contain very specific requirements concerning the slaughter and consumption of animals. The production of kosher and halal meat according to Jewish and

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1 See generally Nejdet Delenger, 'Religious Contrasts in Consumer Decision Behaviour Patterns: Their Dimensions and Marketing Implications' (1994) 28 *European Journal of Marketing* 36; Bryna Shatenstein and Parviz Ghadirian, 'Influences on Diet, Health Behaviours and their Outcome in Select Ethnocultural and Religious Groups' (1998) 14 *Nutrition* 223; S Mennell, A Murcott and A H van Oosterloo, *The Sociology of Food: Eating, Diet and Culture* (Sage Publications, 1992).

2 See, eg, Elaine H Asp, 'Factors Influencing Food Decisions Made by Individual Consumers' (1999) 24 *Food Policy* 287; Karijn Bonne and Wim Verbeke, 'Religious Values Informing Halal Meat Production and the Control and Delivery of Halal Credence Quality' (2008) 25(1) *Agriculture and Human Values* 35.

3 Department of Immigration and Citizenship, Commonwealth of Australia, *The People of Australia: Australia's Multicultural Policy* (2010) 2 <http://www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf>.

Islamic religious rituals, respectively, involves cutting an animal's throat while it is fully conscious and then permitting the animal to exsanguinate.

However, in Australia, animals whose meat is intended for general consumption are required by Commonwealth Codes and Standards to be pre-stunned before they are slaughtered.⁴ Cattle and sheep are required to be unconscious or insensible when they are killed in order to minimise the suffering associated with the slaughter process.

A conflict therefore exists between the requirements for the slaughter of animals generally mandated by Commonwealth Codes and Standards on the one hand and the specific requirements of the Jewish and Islamic traditions for the religious slaughter of animals on the other. This article identifies two possible regulatory responses available to the Commonwealth, state and territory governments in addressing this conflict:

- i) Attempt to prohibit the religious ritual slaughter of animals; and
- ii) Introduce food labelling requirements that enable consumers to make an informed choice about whether to buy meat from an animal that has been slaughtered through religious ritual.

Recent attempts to address this conflict by governments in the European Union and in New Zealand have largely failed. Legislative attempts to either prohibit the religious ritual slaughter of animals or to specially label meat from ritually slaughtered animals have been defeated by well co-ordinated campaigns criticising the government for contravening rights of freedom of religion and religious practice guaranteed by treaty or statute.

Despite the difficulties experienced in other jurisdictions, both the Commonwealth and several state governments are intending to address this conflict through reviews into current food labelling laws⁵ and by introducing new food labelling legislation.⁶

Accordingly, Part II of this article considers several social, cultural, and legal questions associated with the regulation of religious ritual slaughter of animals within Australia. Firstly, how does this conflict arise? That is, how are the practices of halal and kosher means of slaughter of animals exempted from requirements contained in generic animal welfare legislation and Commonwealth Codes and Standards? Secondly, given the existence of this conflict, what regulatory responses are open to the Commonwealth, state, or territory governments to address the conflict?

4 Commonwealth Scientific and Industrial Research Organisation ('CSIRO') *Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption* (AS 4696) (2007); M K Edge, Australian Meat Industry Council, *Industry Animal Welfare Standards: Livestock Processing Establishments – Preparing Meat for Human Consumption* (2009); Standing Committee on Agriculture and Resource Management ('SCARM') *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering* (2002).

5 Food Labelling Law and Policy Review Panel (Cth), *Labelling Logic: Review of Food Labelling Law and Policy* (2011).

6 See, eg, *Food Amendment (Beef Labelling) Act 2009* (NSW).

In evaluating these regulatory responses, Part III of this article considers the effectiveness of the Australian legal framework in guaranteeing freedom of religion and religious practice. It argues that neither the *Constitution* nor state *Human Rights Acts* would function as a *prima facie* obstacle to the Commonwealth or state and territory governments attempting to regulate the practice of the religious slaughter of animals.⁷

Part IV of this article evaluates the first regulatory response: the outright prohibition on the practice of the religious slaughter of animals. It describes the experience of the New Zealand government to prohibit the religious ritual slaughter of animals. Because this attempt was defeated on religious grounds, the article explores the religious justification for the ritual slaughter of animals, including the difficult scientific debate about the extent to which animals feel pain during the slaughter process.

I conclude that despite recent and more sophisticated scientific studies suggesting that animals experience more pain when slaughtered by religious ritual, the practice is not likely to be prohibited. Although there is a general movement in Western societies toward increased recognition of animal interests and welfare, there is no philosophical consensus attributing sufficient weight to the interests of animals that would outweigh human rights claims recognised through freedom of religious practice.

Part V of this article evaluates the second regulatory response, the introduction of meat labelling legislation. Labels that distinguish meat from animals slaughtered without stunning from meat from animals that have been stunned before slaughtering shifts the debate from a conflict between human rights versus animal rights to one of consumer choice.

In this Part, I also discuss attempts by the European Union to introduce similar labelling legislation, the present Commonwealth Government review of food labelling laws, and the New South Wales *Food Amendment (Beef Labelling) Act 2009* (NSW).

The article concludes in Part VI by arguing that the second regulatory option, meat labelling laws, is the most likely to succeed. This is because labelling initiatives shift the emphasis of the debate away from arguments about well recognised human rights claims versus uncertain animal interests and freedom of religious practice versus animal welfare. Rather, the emphasis shifts to one of consumer choice. Religious slaughter of animals continues, but labelling initiatives will enable consumers to make an informed choice about the meat products they choose to buy.

7 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

II SOCIAL, CULTURAL AND LEGAL CONTEXT

Addressing these issues involves very complex considerations, similar to those noted to have arisen during the campaign against religious slaughter of animals in 19th century Europe:

a complex and explosive discourse raising anthropological, theological, scientific and political questions ... [addressing] fundamental issues regarding liberal democracy, ethics, religious freedom and tolerance, the status of minority groups with different religious sensibilities from those shared by the majority of a society's citizens, and of course, animal welfare.⁸

Each of these dimensions of the debate necessarily informs any attempt to address the two regulatory options outlined above. Nevertheless, these multi-dimensional factors can be subsumed within and then addressed through three interrelated dimensions: the practical, the legal, and the religious or philosophical.

Firstly, the practical: why do the practices of the religious slaughter of animals raise concerns? Secondly, the legal: to what extent can governments attempt to either directly or indirectly regulate the practice of religious slaughter of animals? And thirdly, the philosophical or religious: to what extent *should* the religious ritual slaughter of animals be qualified or defeated given inconsistent desires to improve the welfare of animals as sentient beings?

These three dimensions are interrelated in the sense that the way we treat animals is largely determined by the legal and regulatory framework of our society. Australia's legal and regulatory frameworks are, in turn, a product of the way we think about animals – in this case, the way religion characterises the relationship between religious practice and animals.

Whether, and to what extent, Australia has managed to address this inconsistency is one important measure of its success in realising multiculturalism as part of the nation's stated liberal democratic orientation.⁹

A Domestic Consumption and Export of Meat Animals

Australians consume a significant amount of meat and meat products each year. This demand is reflected in the gradual increase in Australian meat production for both domestic and export markets.

The Australian Bureau of Statistics' *Livestock Products* report for the September 2010 Quarter indicates that total red meat production in Australia increased by two per cent to a figure of 764 000 tonnes of slaughtered meat

8 John M Efron, 'The Most Cruel Cut of All? The Campaign Against Jewish Ritual Slaughter in Fin-de-Siècle Switzerland and Germany' (2007) 52 *Leo Baeck Institute Yearbook* 167, 167.

9 Ronald Kaye, 'The Politics of Religious Slaughter of Animals: Strategies for Ethno-Religious Political Action' (1993) 19 *New Community* 235, 245; Tony Kushner, 'Stunning Intolerance: A Century of Opposition to Religious Slaughter' (1989) 36 *The Jewish Quarterly* 216.

compared with the previous quarter.¹⁰ To give these figures some perspective, Meat & Livestock Australia reports:

Over the 12 months to September 2010, fresh meat purchases increased three per cent to about 133 million serves/week. Contributing to the trend was a rise in beef (by four per cent), lamb (up two per cent) and chicken purchases (up six per cent) to 52 million serves/week, 22 million serves/week and 38 million serves/week, respectively.¹¹

In terms of meat exports, beef and veal exports during 2010 amounted to approximately 923 000 tonnes, with much of that meat shipping to Asian markets.¹²

Australia also exports a significant amount of beef and sheep meat to Muslim countries for slaughter according to halal procedures. According to Animals Australia, some 22 million sheep have been exported to Kuwait alone over the past 20 years.¹³ Exports of beef and sheep continued to grow throughout 2010 with Australian producers supplying wealthy Islamic nations.¹⁴

Of these Islamic nations, Indonesia is one of Australia's largest importers of live cattle. In 2009, 80 per cent of Australia's cattle exports went to Indonesia.¹⁵

B Religious Ritual Slaughter of Animals in Jewish and Islamic Traditions

Both the Jewish and Islamic traditions regulate the kind of food that may be consumed as well as the method by which animals for food are to be slaughtered.

In the Islamic tradition, for meat to be declared halal, it must be slaughtered according to a certain religious ritual. The *Qur'an* requires Muslims to abide by what is halal, that is, what is permitted. Halal stands in opposition to haram, that which is forbidden.¹⁶

An example is the injunction to eat food that is halal. Sura 6:121 states: 'Do not eat of any flesh that has not been consecrated in the name of Allah for that is sinful.'¹⁷ Sura 6:119 states: 'How is it with you that you do not eat that over which Allah's name has been mentioned, seeing that he has distinguished for you

10 Australian Bureau of Statistics, *Livestock Products* (September 2010), 4
<[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/69286000980DAC90CA2577DD001296F0/\\$File/72150_September per cent202010.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/69286000980DAC90CA2577DD001296F0/$File/72150_September%20per%20cent202010.pdf)>.

11 Meat & Livestock Australia, *Australian Fresh Meat Consumption Increases* (3 December 2010)
<<http://www.mla.com.au/Prices-and-markets/Market-news/Australian-fresh-meat-consumption-increases#>>.

12 Meat & Livestock Australia, *Fast Finish to 2010 for Aussie Beef Exports* (11 January 2011).
<<http://www.mla.com.au/Prices-and-markets/Market-news/Fast-finish-to-2010-for-Aussie-beef-exports>>.

13 Animals Australia, *Live Export Investigation 2010* (2010)
<<http://www.animalsaustralia.org/investigations/live-export-investigation-2010.php>>.

14 David Weber, *Australia to Beef up Live Exports* (30 October 2010) ABC News
<<http://www.abc.net.au/news/stories/2010/10/30/3052732.htm>>.

15 Royal Society for the Prevention of Cruelty to Animals ('RSPCA'), *RSPCA Response to Independent Study into Animal Welfare Conditions for Cattle in Indonesia from Point of Arrival from Australia to Slaughter* (21 December 2010)
<<http://www.rspca.org.au/assets/files/Campaigns/ResponsetoIndonesiaReport270111.pdf>>.

16 David Waines, *An Introduction to Islam* (Cambridge University Press, 2nd ed, 2003) 78–9.

17 *The Holy Qur'an* (N J Davidson, trans, Penguin, 1975) Sura 6:121 (*Qur'an*).

that which he has forbidden you unless you are constrained to it'¹⁸. Therefore: 'Meat which has not been properly slaughtered is declared haram because it is against Allah's will to slaughter animals improperly'.¹⁹

The animal is restrained and a prayer to Allah is spoken into the animal's ear. The throat is then cut while the animal bleeds to death. Whether and to what extent the practice of slaughter without pre-stunning is required by Islam is itself a controversial issue. There appears to be no consistent agreement on the issue with the result that some Islamic scholars insist on the practice whereas others do not.²⁰

In the Jewish tradition, animals must be slaughtered according to the *shechita* method in order to produce kosher meat. *Shechita* is the term given to the Jewish religious practice of slaughtering animals and poultry in a manner that renders meat ritually fit for consumption.

The slaughter process involves a trained worker (called a '*shochet*') using a very sharp knife to cut the trachea, oesophagus, carotid arteries, and jugular vein of an un-stunned, fully conscious animal that is then exsanguinated.

The animal must be healthy before slaughter, and it must be killed by a trained Jewish male, called a *shochet*, using a single cut of a sharp knife, called a *chalef*. The cut must sever the carotid arteries; in practice animal anatomy dictates that the cut sever the oesophagus and trachea as well. Of course, such a cut is also part of secular commercial slaughter. The critical difference is that animals slaughtered according to Jewish law cannot be stunned before slaughter ... Muslim dietary law requires a similar method of slaughter, though some Muslim authorities accept pre-slaughter stunning that is temporary...²¹

Shechita UK's May 2009 publication *A Guide to Shechita* states that '[the] time-hallowed practice of *shechita*, marked as it is by compassion and consideration for the welfare of the animal, has been a central pillar in the sustaining of Jewish life for millennia.'²²

C Existing Legal Regulation of Animal Slaughter

In Australia, the Commonwealth Government does not directly possess constitutional powers to legislate for animal welfare because the *Constitution* does not directly address the issue.²³ Accordingly, the regulation of animals and animal welfare involves a complex network of both federal and state legislation, codes of practice and regulations.²⁴ At the local government level, regulations

18 Ibid Sura 6:119.

19 Ibid.

20 Florence Bergeaud-Blackler, 'New Challenges for Islamic Ritual Slaughter: A European Perspective' (2007) 33(6) *Journal of Ethnic and Migration Studies* 965, 974–5.

21 Jeff Welty, 'Humane Slaughter Laws' (2007) 70 *Law & Contemporary Problems* 175, 177–8.

22 Shechita UK, *A Guide to Shechita* (May 2009) 3
<http://www.shechitauk.org/uploads/tx_resources/A_Guide_to_Shechita_2009_01.pdf>.

23 Steven White, 'Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?' (2007) 35 *Federal Law Review* 347, 363.

24 A Dale, 'Animal Welfare Codes and Regulations – The Devil in Disguise?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 174.

exist concerning the registration of domestic pets, animal control and other issues.

At common law, animals are classified as property²⁵ and, at least in theory, may be treated as chattels by their owners. Despite their status as property, animals are provided with a *prima facie* measure of protection against cruelty by state and territory legislation.²⁶ For the purposes of discussion, this article will refer to the provisions of the New South Wales *Prevention of Cruelty to Animals Act 1979* (NSW) (*'POCTA Act'*).

The slaughter of animals at abattoirs necessarily involves conduct calculated to destroy their lives.²⁷ In this context, two questions arise: (1) how is animal slaughter generally exempted from scrutiny under state and territory animal welfare statutes?; and (2) how are particular practices involving the religious slaughter of animals exempted from those statutes, as well as the more specific regulation of animal slaughter at abattoirs?²⁸

1 General Animal Welfare Legislation

The animal welfare legislation in each state and territory prohibit acts of cruelty toward animals.²⁹ Sections 5 and 6 of the *POCTA Act* prohibit acts of cruelty and aggravated acts of cruelty toward animals. Section 5 provides:

5 Cruelty to animals

- (1) A person shall not commit an act of cruelty upon an animal.
- (2) A person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal.
- (3) A person in charge of an animal shall not fail at any time:
 - (a) to exercise reasonable care, control or supervision of an animal to prevent the commission of an act of cruelty upon the animal,
 - (b) where pain is being inflicted upon the animal, to take such reasonable steps as are necessary to alleviate the pain, or
 - (c) where it is necessary for the animal to be provided with veterinary treatment, whether or not over a period of time, to provide it with that treatment.

Section 6 provides:

6 Aggravated cruelty to animals

- (1) A person shall not commit an act of aggravated cruelty upon an animal.
Maximum penalty: 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years, or both, in the case of an individual.

25 *Saltoon v Lake* [1978] 1 NSWLR 52.

26 *Animal Care and Protection Act 2001* (Qld); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act* (Tas); *Animal Welfare Act 1993* (SA); *Animal Welfare Act 2002* (WA); *Animal Welfare Act* (NT).

27 Welty, above n 21, 176–182.

28 CSIRO, above n 4; Edge, above n 4; SCARM, above n 4.

29 Deborah Cao, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 115.

Additional provisions in both the *POCTA Act* and the *Crimes Act 1900* (NSW) prohibit other forms of conduct toward animals that would cause pain and distress.³⁰ These include protection from being transported in a way that causes unreasonable, unnecessary, or unjustifiable pain and protection from being mutilated in a certain way.³¹

2 Exemptions for Slaughter of Animals for Food and Religious Slaughter Exemptions

Although the *POCTA Act* prohibits acts of cruelty, defences are available for conduct directed toward the slaughtering of animals for food generally and for religious rituals specifically. Section 24(1)(b)(ii) provides that

24 Certain defences

- (1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person:
 - (b) in the course of, and for the purpose of:
 - (ii) destroying the animal, or preparing the animal for destruction, for the purpose of producing food for human consumption,

in a manner that inflicted no unnecessary pain upon the animal.

In a similar manner, a specific defence under the *POCTA Act* is created for the slaughter of animals according to the religious rituals of both the Jewish and Islamic traditions. Section 24(1)(c)(i) of the *POCTA Act* provides:

24 Certain defences

- (1) In any proceedings for an offence against this Part or the regulations in respect of an animal, the person accused of the offence is not guilty of the offence if the person satisfies the court that the act or omission in respect of which the proceedings are being taken was done, authorised to be done or omitted to be done by that person:
 - (c) in the course of, and for the purpose of, destroying the animal, or preparing the animal for destruction:
 - (i) in accordance with the precepts of the Jewish religion or of any other religion prescribed for the purposes of this subparagraph.

In this way, the destruction of animals generally for the purposes of domestic food consumption undertaken at commercial abattoirs is not characterised as an act of cruelty.

30 *POCTA Act 1979* (NSW) ss 4, 5, 7, 8, 9, 10, 12, 16; *Crimes Act 1900* (NSW) s 530.

31 Cao, Sharman and White, above n 9, 192–4.

3 *Specific Exemptions for Religious Slaughter of Animals*

Generally, the treatment and slaughter of animals intended for human consumption are heavily regulated by several overlapping Commonwealth Codes and Standards.

Three of these are relevant to this discussion:

1. The CSIRO's *Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption* (AS 4696:2007) ('CSIRO Standard');
2. The Australian Meat Industry Council's *Industry Animal Welfare Standards for Livestock Processing Establishments Preparing Meat for Human Consumption 2009-2010* (2nd ed) ('AMIC Standards'); and
3. SCARM's *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* ('SCARM Code').

Each of these standards and codes regulate the slaughter of animals intended for human consumption, and each provides a *specific exception* for the religious ritual slaughter of animals.

Clause 7.10 of the CSIRO Standard provides that before they are killed, animals must be stunned in a way that ensures they are unconscious and insensible to pain and do not regain consciousness. The method of killing is referred to as 'sticking', defined in clause 3.1 of the CSIRO Standard to mean 'the severing of the large blood vessels to induce effective bleeding'.

However, clause 7.12 of the CSIRO Standard provides that animals do not have to be pre-stunned where there is an 'approved arrangement' for the purposes of ritual slaughter. 'Ritual slaughter' is defined in clause 3.1 to mean the slaughter of animals (a) in accordance with Islamic rites in order to produce halal meat or (b) in accordance with Judaic rites in order to produce kosher meat.

The CSIRO Standard is given legal force in various states and territories of Australia through state and territory food regulations. For example, in New South Wales, clause 64 of the *Food Regulation 2010* (NSW) provides that abattoirs must comply with the CSIRO Standard in slaughtering meat (other than poultry, rabbit, ratite or crocodile meat).

In addition to the CSIRO Standard, the SCARM Code clause 2.6, outlines the process for stunning animals before slaughter. Specifically, clause 2.6.1.6 of the SCARM Code provides that 'stunning for religious slaughter should be encouraged.'

In terms of slaughtering and exporting halal meat, the Australian Quarantine and Inspection Service ('AQIS') has developed specific guidelines that operate alongside the codes and standards discussed above. Issued pursuant to the *Export Control Act 1982* (Cth) and effective since 1 June 2009, AQIS Meat Notice 2009/08 *Guidelines for the Preparation, Identification, Storage and Certification for Export of Halal Red Meat and Red Meat Products* ('AQIS Guidelines') regulates the slaughter of animals for halal purposes for export.

In terms of stunning, clause 5.2 of the AQIS Guidelines incorporates the requirements of the AMIC Standards. AMIC Standard 6 is titled 'Humane

Slaughter Procedures' and contains seven principles. Principle 4 states that 'animals must be effectively stunned before sticking commences'.

These codes and standards are given legislative force in states and territories through relevant food regulations. For example, clause 64(1) of the *Food Regulation 2010* (NSW) expressly incorporates the requirement that animals must be stunned before sticking that is contained in the CSIRO Standard.

Under this scheme the only exception to the requirement that animals be stunned prior to slaughter appears to be where an abattoir has entered into an 'approved arrangement' pursuant to clause 7.12 of the CSIRO Standard.

The AQIS Guidelines on halal production identify 'Approved Islamic Organisations' that will have sole responsibility for the production of halal meat. Possessing the status as an Approved Islamic Organisation is an important right that has been the subject of litigation. For example, in *Ayan v Islamic Co-ordinating Council of Victoria Pty Ltd* [2009] VSC 119, the Supreme Court of Victoria considered an allegation that the peak Islamic approval organisation had delisted another halal operator in an attempt to gain a monopoly over the production of halal meat.

4 *Australian Abattoirs Not Stunning Animals*

Many animal welfare organisations assumed that all Australian abattoirs were complying with the stun requirements of these Codes and Standards, even where animals were produced for halal or kosher consumption. For example, then-president of the Victorian RSPCA Hugh Wirth alleged that since 1989, AQIS had assured the RSPCA that no religious slaughter without stunning was being conducted in Australia.³²

However, in early 2007, the RSPCA received a complaint alleging that workers at Midfield Meats Warrnambool abattoir were not stunning some animals prior to slaughter.³³

Subsequent investigation revealed that Midfield Meats and three other Victorian abattoirs at Kyneton, Carrum and Geelong had entered into 'approved arrangements' with AQIS allowing the religious slaughter of animals without the prior stunning mandated by the various codes and standards.³⁴

Intense media coverage of the allegations prompted then Howard Government Federal Agriculture Minister Mr Peter McGauran to postpone making a decision on the issue of approved arrangements for non-stun slaughter of animals pending a review of the practice.

32 'Probe over Halal Slaughter in Religious Row', *Herald Sun* (online), 3 August 2007 <<http://www.heraldsun.com.au/news/victoria/probe-over-halal-slaughter/story-e6fr7kx1111114099788>>.

33 Lorna Edwards, 'Non-stun Killing Hurts \$10bn Industry, Says Halal Exporter', *The Age* (online), 13 August 2007 <<http://www.halalproducts.com.au/halal-products-articles/2007/8/13/nonstun-killing-hurts-10bn-industry-says-halal-exporter/>>.

34 *Ibid.*

Mr McGauran stated:

The ritual slaughter will continue under the existing guidelines to the standard and I would expect the review to take only a matter of a few months. There is a matter of urgency because animal welfare standards have been rightly raised, but I stress that the abattoirs, both tier one and export abattoirs are within the law and have been approved by AQIS.³⁵

In effect, the Minister was confirming that this conduct was lawful in Australia and unlikely to change in the near future.

Since the 2007 federal election, responsibility for the proposed Review was inherited by the Hon Tony Burke, Minister for Agriculture, Fisheries and Forestry in the Labor Government until September 2010. During the February 2010 Parliamentary sittings, Mr Burke admitted that neither he, nor the Primary Industries Ministerial Committee ('PIMC'), were intending to revoke exemptions already granted by AQIS permitting the slaughter of animals without prior stunning for halal purposes.³⁶ In September 2010, after another federal election, Mr Burke was replaced by the Hon Senator Joe Ludwig. As at the date of writing, the Review is in progress though no findings or recommendations have been released.

The issue is of concern because there have been documented cases in both Australia and the United States of halal and kosher slaughtering practices amounting to acts of unnecessary cruelty toward animals that defies justification on any grounds, religious, cultural, or otherwise.

For example, in October 2010, Councillor Gary Lucas of the Liverpool City Council in Sydney received majority support to lodge a motion at the Local Government Association Annual Conference seeking to ban backyard religious slaughter of animals in New South Wales.³⁷ The Council motion was prompted by a complaint from a resident who witnessed about 30 men on his neighbour's property who 'ran through the paddock, tackling these terrified sheep to the ground and slit their throats. They then hacked them to pieces'.³⁸

This Australian example of outright and unchecked cruelty sits alongside other egregious offences to animal welfare statutes perpetrated in the United States. For example, in 2004 at the Agriprocessors kosher meat abattoir in Iowa, a meat-processing worker (who was actually working for the People for the Ethical Treatment of Animals ('PETA')) secretly filmed workers torturing and butchering kosher animals in gross violation of the Federal *Humane Methods of Livestock Slaughter Act*, 7 USC § 1901–7.³⁹ A subsequent investigation by the

35 Jane Bardon, *Public 'Misled' over Halal Slaughter Standards* (09 August 2007) ABC Rural <<http://www.abc.net.au/rural/sa/content/2006/s2000853.htm>>.

36 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 February 2010, 157.

37 George Roberts, *Muslim Community Rejects Animal Slaughter Claims* (20 August 2009) ABC News <<http://www.abc.net.au/news/stories/2009/08/20/2662324.htm>>.

38 Simone Roberts, 'Backyard Slaughter 'Inhumane'', *Liverpool Leader* (online), 1 December 2010 <<http://liverpool-leader.wherelive.com.au/news/story/backyard-slaughter-inhumane/>>.

39 PETA, *PETA Reveals Extreme Cruelty at Kosher Slaughterhouses* (2011) <<http://www.peta.org/features/agriprocessors.aspx>>.

United States Department of Agriculture resulted in PETA's film and allegations being referred to the Assistant US Attorney for the Northern District of Iowa.⁴⁰

Other relevant examples of cruelty include the 2010 joint Meat & Livestock Australia and LiveCorp Report into the handling and slaughter of export cattle to Indonesia, which indicated that the average number of cuts taken to slaughter the cattle was four and, in one case, 18 cuts were needed.⁴¹ This report is discussed in more detail later in this article.

D The Imperative for Australia

The Australian Commonwealth Government's stated commitment to multiculturalism means that it will need to navigate and find an appropriate balance between the freedom of religious expression and a clear call from consumers for transparency in relation to the lives and treatment of the animals they choose to eat. During 2010, the Government initiated or progressed several reviews or reports into the labelling of food generally, and the issue of religious slaughter of animals specifically.

Also relevant is the New South Wales Government's enactment of the *Food Amendment (Beef Labelling) Act 2009* (NSW) that came into effect in August 2010. This Act addresses the issue of halal and kosher meat labelling.

These issues have assumed heightened importance given both the current Commonwealth Joint Standing Committee on Migration's *Inquiry into Multiculturalism in Australia*⁴² and the Australian Human Rights Commission Report, *Freedom of Religion and Belief in 21st Century Australia*⁴³ ('the 2011 AHRC Report') released on 21 March 2011 as part of the broader Commonwealth National Action Plan to Build Social Cohesion, Harmony and Security.

Australia is not the first country to struggle with these issues. During 2010, the United Kingdom, the European Union and New Zealand attempting to address these issues through legislation.⁴⁴ These attempts failed, largely due to challenges from Jewish and Islamic representative organisations arguing that such laws infringed fundamental human rights to freedom of religious thought and practice.

In order to establish a context for evaluation of the two regulatory options set out earlier (ban religious slaughter or introduce labelling requirements), it is important to consider a threshold issue: to what extent does the Australian legal

40 PETA, *USDA Report Finds that Agriprocessors Violated Humane, Kosher Laws* <<http://www.mediapeta.com/peta/pdf/USDA-Agriprocessors.pdf>>.

41 Meat & Livestock Australia and LiveCorp, *Live Trade Animal Welfare Partnership 2009/10: Final Report - Indonesian Point of Slaughter Improvements* (May 2010), 37 <http://www.daff.gov.au/data/assets/pdf_file/0005/1886477/indonesia.pdf>.

42 Joint Standing Committee on Migration (Cth), *Inquiry into Multiculturalism in Australia* (2011) <<http://www.aph.gov.au/house/committee/mig/multiculturalism/media/media01.pdf>>.

43 Gary Bouma et al, Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (2011).

44 *The Welfare of Animals (Slaughter or Killing) Regulations 1995* (UK); *Animal Welfare (Commercial Slaughter) Code of Welfare 2010* (NZ); *EU Resolution 205* (16 June 2010).

framework protect freedom to engage in religious practices? It is only if the existing legal framework is permeable and would permit some degree of regulation, that these regulatory options can be realistically evaluated.

III THE LEGAL PROTECTION OF RELIGIOUS FREEDOM IN AUSTRALIA

A Constitutional Protection

The extent to which freedom of religion is protected, tolerated, or permitted by law in Australia has been discussed in more detail in other contributions to this edition of the journal and elsewhere.⁴⁵

A useful overview of the Australian position is contained in the 2011 AHRC Report.⁴⁶ The Report summarises the extent of legal protection of religious freedoms in Australia by referring to an earlier report by the then Human Rights and Equal Opportunity Commission. Titled *Article 18: Freedom of Religion and Belief*⁴⁷ this 1998 report concluded that despite Australia's ratification of international instruments, such as the *International Covenant on Civil and Political Rights*, the actual level of protection given by Commonwealth law to freedom of religion was relatively weak.

There are a number of reasons for this, including the relatively weak nature of section 116 of the *Australian Constitution* that does not in fact guarantee freedom of religion (in the form of separation of church and state)⁴⁸ and the inconsistent coverage of human rights provisions contained in state and territory statutes.⁴⁹

These rights-specific legislative protections are supplemented by Commonwealth, state and territory anti-discrimination legislation that prohibit acts of discrimination on several grounds, including race and religious belief. However, there is little uniformity in the anti-discrimination legislation as to both the characterisation and protection of religious belief and practice.⁵⁰

Any attempt by the Commonwealth government to directly prohibit the practice of religious slaughter of animals is likely to be challenged on the grounds that it offends section 116 of the *Constitution*. Yet it is an open question as to whether, under such a challenge, section 116 of the *Constitution* would

45 See, eg, Garth Blake, 'God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century' (2009) 31 *Australian Bar Review* 279; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 299 ff; Michael Eburn, 'Religion and the Constitution – An Illusory Freedom' (1995) 8 *Australian Religion Studies Review* 77.

46 Bouma et al, above n 43.

47 Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (Paper, 1998).

48 *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 652 (Wilson J) ('*DOGS Case*').

49 Of the state constitutions, only the *Constitution Act 1934* (Tas) s 46 expressly protects freedom of religion, although in the ACT and Victoria the *Human Rights Act 2004* (ACT) s 14 and Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) Pt 2 do also expressly protect that freedom.

50 Blake, above n 45, 289.

function in the same manner as the First Amendment⁵¹ to the *United States Constitution*.

Although section 116 of the *Australian Constitution* is drafted in similar language, it has not been developed or refined in litigation involving religious issues to anywhere near the same extent as the First Amendment.⁵²

B State Human Rights Legislation

An unexplored question is whether the religious slaughter of animals could be prohibited by state or territory legislation. Unlike the Commonwealth, the states and territories are not confined in their ability to make laws with respect to religious matters. The High Court in the *DOGS Case* noted that, while the effect of section 116 of the *Constitution* prevented the Commonwealth from establishing a religion, it does not so limit the states and territories:

The plaintiffs' claim that it represents a personal guarantee of religious freedom loses much of its emotive and persuasive force when one must add "but only as against the Commonwealth". The fact is that s 116 is a denial of legislative power to the Commonwealth, and no more. No similar constraint is imposed upon the legislatures of the States. The provision therefore cannot answer the description of a law which guarantees within Australia the separation of church and state.⁵³

Tasmania, the Australian Capital Territory, and Victoria have expressly protected freedom of religion and religious practice. Both section 14 of the *Human Rights Act 2004* (ACT) and section 14 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) express the right to freedom of religion and religious practice in similar terms.

The ACT legislation provides:

14 Freedom of thought, conscience, religion and belief

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

51 The First Amendment to the *United States Constitution* reads: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

52 Melissa Lewis, 'The Regulation of Kosher Slaughter in the United States: How to Supplement Religious Laws so as to Ensure the Humane Treatment of Animals' (2010) 16 *Animal Law* 259; Claudia E Haupt, 'Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter' (2007) 39 *The George Washington International Law Review* 839; Gerald F Masoudi, 'Kosher Food Regulation and the Religion Clauses of the First Amendment' (1993) 60(2) *The University of Chicago Law Review* 667.

53 *DOGS Case* (1981) 146 CLR 559, 652 (Wilson J).

- (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

The other states and territories do not have legislative human rights protections. Accordingly, it is unlikely that any attempt by, for example, the New South Wales Government to require compulsory labelling of halal or kosher meat pursuant to the *Food Amendment (Beef Labelling) Act 2009* (NSW) could be challenged. And, given the approach of the High Court in the *DOGS Case*, nor would that legislation be open to challenge under section 116 of the *Constitution*.

Does this imply that states or territories that have enacted explicit human rights protections are unable to prohibit or regulate the religious slaughter of animals? This has to be approached cognisant of the fact that the rights guaranteed by human rights legislation can be constrained in certain circumstances. For example, section 28 of the *Human Rights Act 2004* (ACT) provides:

28 Human rights may be limited

- (1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is expressed in similar terms permitting justifiable limitations.

In *Auckland Hebrew Congregational Trust Board v Minister of Agriculture* [2010] NZHC 2185, one of the grounds of challenge to the New Zealand Government's attempt to prohibit the practice of *shechita* was that the prohibition did not fit within the 'justified limitations' provision of the *New Zealand Bill of Rights Act 1990* (NZ), a provision that is similar to the limitation provisions described above. Although the Court did not decide the issue, the larger philosophical question remains: to what extent *should* religious slaughter practices be protected by human rights legislation?

Framing the question in terms of the human rights legislation, can legislation prohibiting or limiting the practice of religious slaughter of animals be 'demonstrably justified in a free and democratic society'? This question moves the discussion beyond solely legal questions and into the realm of moral, values and ethics; that is, what behaviours and practices should either be encouraged or prohibited in a 'free and democratic society'?

Consequently, it seems that neither the *Constitution* nor the various Human Rights Acts would function as a *prima facie* obstacle to the Commonwealth or state and territory governments attempting to regulate the practice of the religious slaughter of animals. It remains to evaluate the two regulatory responses posed

earlier in this article: either an outright prohibition on the practice of the religious slaughter of animals or indirect regulation through product labelling.

IV REGULATORY RESPONSE ONE: PROHIBIT THE RELIGIOUS SLAUGHTER OF ANIMALS

A The New Zealand Experience

On 28 May 2010, the New Zealand Minister for Agriculture, Mr David Carter issued the *Animal Welfare (Commercial Slaughter) Code of Welfare 2010* ('NZ Code'). The NZ Code is intended to 'assist those involved in commercial slaughter to identify and address animal welfare requirements'⁵⁴ by prescribing 24 minimum standards for the management and care of animals that are to be commercially slaughtered.

Like the various Australian Codes and Standards regulating the commercial slaughter of animals, Minimum Standard No 6 of the NZ Code relates to the stunning of large mammals and provides:

Prior to slaughter, all animals must be stunned so that they are immediately rendered insensible and must be maintained in that state until death supervenes. This includes a method of stunning that results in immediate insensibility and death.

However, *unlike* the Australian codes and standards, the NZ Code does not provide for exceptions to the Minimum Standard for stunning in relation to animals that are to be slaughtered for religious purposes. In other words, there is no procedure whereby an abattoir in New Zealand can enter into an 'approved arrangement' with the relevant New Zealand authority to slaughter animals for halal or kosher meat without prior stunning of those animals.

The Minister's decision to refuse such an exemption, specifically in relation to the Jewish *shechita* method of slaughter, was made against an earlier recommendation of the National Animal Welfare Advisory Committee ('NAWAC').

In April 2009, NAWAC had prepared a report into the then draft NZ Code recommending

that a dispensation be granted under section 73 of the *Animal Welfare Act 1999* to allow *Shechita*, the Jewish method of slaughter, to be practised in order to meet the direct needs of the New Zealand Jewish community. This is necessary to allow Jewish people to manifest their religion and belief (as provided for in the *New Zealand Bill of Rights Act 1990*) and because NAWAC considers that *Shechita* does not meet the minimum standard for commercial slaughter.⁵⁵

Representatives of the Orthodox Jewish Communities in Auckland and Wellington instituted proceedings against the Agriculture Minister, the Hon.

⁵⁴ *Animal Welfare (Commercial Slaughter) Code of Welfare 2010* (NZ) para 1.1.

⁵⁵ National Animal Welfare Advisory Committee, *Animal Welfare (Commercial Slaughter) Code of Welfare Report* (22 April 2009) MAF Biosecurity NZ, 20 <<http://www.biosecurity.govt.nz/animal-welfare/codes/commercial-slaughter>>.

David Carter in the High Court seeking orders for judicial review of the Minister's decision to issue the NZ Code without an exemption for *shechita* slaughter. In *Auckland Hebrew Congregational Trust Board v Minister of Agriculture* [2010] NZHC 2185 (25 November 2010), the plaintiffs sought leave to cross-examine the Minister for Agriculture on an affidavit he had provided going to his reasons for issuing the NZ Code without an exemption for *shechita* slaughter.

In support of their application, the plaintiffs alleged that the prohibition in the NZ Code against *shechita* slaughter did not fall within the 'justified limitations' provision of the *New Zealand Bill of Rights Act 1990* (NZ) ('NZ Rights Act').

Section 5 of the NZ Rights Act provides:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The plaintiffs alleged that the practice of *shechita* was permitted under sections 13, 14, and 15 of the NZ Rights Act. These sections provide, inter alia, for the freedom of religion and belief, freedom of expression, and the right to manifest religious belief or worship, observance, practice, or teaching.

Although the plaintiff's application to cross-examine the Minister was ultimately refused, the Minister did include a new Minimum Standard in the NZ Code permitting *shechita* slaughter. On 10 December 2010, Mr Carter issued Minimum Standard 15A that permitted poultry to be slaughtered without prior stunning.⁵⁶ The new Minimum Standard 15A applies only to poultry. Accordingly, halal or kosher slaughter of large mammals without prior stunning remains illegal.

B Issues Informing the Debate

Although statutes such as the NZ Rights Act and Australian statutes such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) protect freedom of religion and religious practice, those freedoms are not absolute.

They are not absolute because the very statutes creating those rights and freedoms also contain exceptions permitting laws to be made that restrict them, where such restrictions can be 'demonstrably justified in a free and democratic society'.⁵⁷ In these circumstances, the question becomes could an attempt by Commonwealth, state or territory governments to prohibit the religious slaughter of animals be 'demonstrably justified in a free and democratic society'?

Those who argue that religious slaughter practices should be prohibited suggest that religious freedom is not an absolute value and that religious rights

56 *Inclusion of a Further Minimum Standard in the Animal Welfare (Commercial Slaughter) Code of Welfare 2010* (10 December 2010) MAF Biosecurity NZ <<http://www.biosecurity.govt.nz/animal-welfare/codes/commercial-slaughter>>.

57 See, for eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.

can be modified or eliminated where it is in the interests of the state to do so. Accordingly, it is argued that religious practices that cause animals pain or death should not be tolerated.⁵⁸

In response, others argue that animal welfare itself is not an absolute value and that the human right to practice one's religion outweighs any interests, if any, that animals may have.⁵⁹ And even if society is committed to animal welfare, that commitment must defer to human rights. Accordingly, it is argued that to suggest the issue takes the form of a contest between equal rights holders is mistaken since animals and humans do not have equivalent rights.

It is beyond the scope of this article to fully explore all aspects of these ethical and moral issues.⁶⁰ However, in the debate over whether the Commonwealth, state or territory governments *should* prohibit the religious ritual slaughter of animals two aspects are prominent: firstly, the issue of whether religious ritual slaughter of animals causes 'unnecessary pain' and secondly, the need to balance toleration of religious freedom as an expression of multiculturalism, with Australia's stated commitment to animal welfare, outlined in the *Australian Animal Welfare Strategy*.⁶¹ The first issue tends to be argued on the basis of science while the second involves moral and ethical considerations.

1 *Scientific Arguments as to Pain and Suffering during Slaughter*

Is it possible to resolve the debate by evaluating which method of slaughter is more painful to the animals? Should religious slaughter practices be prohibited if it can be unequivocally established that religious slaughter methods that do not require stunning cause more pain to animals than general slaughter methods that do require stunning?

Proponents of religious slaughter argue that killing animals with a sharp knife and permitting them to exsanguinate actually reduces the suffering those animals experience compared with more conventional methods of slaughter involving prior stunning.⁶² According to Shechita UK, the cutting of an animal's throat:

causes an instant drop in blood pressure in the brain and immediately results in the irreversible cessation of consciousness. Thus, shechita renders the animal insensible to pain, dispatches and exsanguinates in a swift action, and fulfils all the requirements of humaneness and compassion.⁶³

58 Haupt, above n 52, 882.

59 Pablo Lerner and Alfredo Mordechai Rabello, 'The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities' (2006–2007) 22 *Journal of Law and Religion* 1, 61.

60 Cf A Bruce, *Animal Law in Australia: An Integrated Approach* (2011) forthcoming LexisNexis, ch 2.

61 *The Australian Animal Welfare Strategy* (18 November 2009) Department of Agriculture, Fisheries and Forestry (Cth), 18 <<http://www.daff.gov.au/animal-plant-health/welfare/aaws>>.

62 ASIDCOM Association, *Benefits of Religious Slaughter without Stunning for Animals and Humans* (March 2010) <www.asidcom.org/.../ASIDCOM_report-Benefits_of_religious_slaughter-2.pdf>

63 Shechita UK, above n 22, 3.

Early scientific studies by Levinger,⁶⁴ Shore,⁶⁵ and Grandin⁶⁶ suggested that animals slaughtered by Jewish *shechita* methods bled out faster than stunned animals and suffered fewer incidents of convulsions when compared with electric bolt stunning.

On these views, the single cut initiates an immediate and irreversible drop in cranial blood pressure leading to immediate insensibility to pain. If the claim is true then the animal feels no pain and death is immediate.

After considering these and particularly Jewish-oriented studies, Lerner and Rabello, scholars from the Ramat Gan School of Law in Israel and the Hebrew University of Jerusalem respectively concluded that

[A]s long as it is not possible to determine with certainty that the amount of suffering caused by one method is considerably greater than that caused by another ... it is difficult to accept any reason whatsoever why kosher *shechita* should be banned.⁶⁷

It is important to note that these studies are now almost 20 years old. More recent studies carried out over the last 10 years with more advanced medical diagnostic equipment have added a considerable degree of certainty in demonstrating that animals do feel pain when their throats, oesophagus, arteries, and veins are cut and then left to bleed out. While the animals cannot bellow in pain (because their throats have been cut), there is evidence that they convulse, choke on their own blood, attempt to stand up after initially collapsing, and then thrash about.

Furthermore, electroencephalographic (EEG) studies indicate that there is no immediate drop in cranial blood pressure following incision and that it can take up to two minutes for an animal to die. During this time, the animal is fully conscious, in extreme distress and does not quickly bleed out. In 2004, Anil et al were able to contradict Levinger's earlier study by demonstrating that animals did not bleed out faster when they were slaughtered without stunning.⁶⁸

In June 2004, the EU Scientific Panel on Animal Health and Welfare published the findings of its extensive scientific study into the welfare aspects of animal slaughter methods. The Opinion concluded:

64 I M Levinger, *Kosher Food from Animals* (Torah Institute for Research in Agriculture, 1975); I M Levinger, *Shechita in the Light of the Year 2000: Critical view of the Scientific Aspects of Methods of Slaughter and Shechita* (Maskil L'David, 1st ed, 1995).

65 L S Shore, 'The Scientific Approach to Resolving Conflicts between Veterinary Science and Shechita' (1999) 54(1) *Israel Journal of Veterinary Medicine* 1.

66 Temple Grandin and Joe Regenstein, 'Religious Slaughter and Animal Welfare: A Discussion for Meat Scientists' (1994) 3 *Meat Focus International* 115.

67 Lerner and Rabello, above n 59, 48.

68 M H Anil et al, 'Comparison of Religious Slaughter of Sheep with Methods that Include Pre-slaughter Stunning and the Lack of Differences in Exsanguination, Packed Cell Volume and Meat Quantity Parameters' (2004) 13 *Animal Welfare* 387.

Cuts which are used in order that rapid bleeding occurs involve substantial tissue damage in areas well supplied with pain receptors. The rapid decrease in blood pressure which follows the blood loss is readily detected by the conscious animal and elicits fear and panic. Poor welfare also results when conscious animals inhale blood because of bleedings into the trachea.⁶⁹

These findings were confirmed by a 2009 study, 'A Scientific Comment on the Welfare of Sheep Slaughtered Without Stunning' undertaken by Monash University, the University of Melbourne, the Victorian Department of Primary Industries and Massey University in New Zealand. The study concluded:

Taken together the conclusions above indicate that because the slaughter of sheep by ventral-neck cutting without prior stunning is likely to cause pain, slaughter of sheep without stunning poses a risk to animal welfare in the period between the time of the neck cut and the time of loss of awareness.⁷⁰

The study demonstrated that pain originated from the sliced nerves in the animal's throats and were transmitted to the brain despite the loss of blood pressure. As a result, the authors of the study were able to detect brain signals corresponding with pain up to two minutes after the animal's throat was cut.

In other words, there is no instant loss of consciousness or insensibility to pain following the incision through the animal's throat. The loss of blood did not prevent pain signals being transmitted to the brain from the nerve endings in the animal's throat.

The evidence suggests that the animal remains conscious, aware of their injury and in great pain for up to two minutes after their throats had been cut. The co-author of the study, Associate Professor Craig Johnson, concluded that their work 'is the best evidence yet that it is painful'.⁷¹

More recent scientific studies confirm the study's results. For example, a 2009 New Zealand study concluded that there was a period following slaughter where the neck incision represented a 'noxious stimulus', that is, a pain-causing event.⁷² Likewise, a 2010 Royal Veterinary College study demonstrated the agonies suffered by animals whose throats had been cut without stunning for halal meat production.⁷³

Significant concerns have also been expressed about the way Australian export cattle are handled and slaughtered in some Islamic nations. In 2010, Meat and Livestock Australia and LiveCorp commissioned a report into the processing

69 *Opinion of the Scientific Panel on Animal Health and Welfare on a Request from the Commission related to Welfare Aspects of the Main Systems of Stunning and Killing the Main Commercial Species of Animals* (2004) EU Scientific Panel on Animal Health and Welfare
<www.efsa.europa.eu/en/efsajournal/pub/45.htm>.

70 Hemsworth et al, *A Scientific Comment on the Welfare of Sheep Slaughtered without Stunning* (14 July 2009) Department of Agriculture, Fisheries and Forestry (Cth), [3]
<http://www.daff.gov.au/_data/assets/pdf_file/0018/1370331/welfare-sheep-slaughter.pdf>.

71 Andy Coghlan, 'Animals Feel the Pain of Religious Slaughter', *New Scientist* (Issue 2730) 13 October 2009.

72 T J Gibson et al, 'Electroencephalographic Responses of Halothane-Anaesthetised Calves to Slaughter by Ventral-Neck Incision without Prior Stunning' (2009) 57 *New Zealand Veterinary Journal* 77.

73 N C Gregory et al, 'Time to Collapse Following Slaughter without Stunning in Cattle' (2010) 85 *Meat Science* 66.

of Australian animals in Indonesia. The report drew together the observations of four veterinary experts who visited abattoirs on the Indonesian islands of Sumatra and Java over a seven day visit in 2010.

The report discloses horrific cases of animal suffering in the process of ritual halal slaughter: 'At an abattoir in Sumatra the neck was struck with a knife using a hard impact to sever the skin above the larynx and then up to 18 cuts were made to sever the neck and both arteries'.⁷⁴ In fact, the report concluded that it took slaughtermen an average of four attempts to sever the animal's trachea, larynx, carotid arteries and jugular vein while the cattle exhibited signs of distress.⁷⁵

These reports refute the 'Cartesian' characterisation of animals as mere automatons and call to mind Cottingham's observations that: 'To be able to believe that a dog with a broken paw is not really in pain when it whimpers is quite an extraordinary achievement, even for a philosopher'.⁷⁶

Likewise, to conclude that a fully conscious animal whose trachea, oesophagus, carotid arteries, and jugular vein have been severed through an average of four cuts is not really in any pain is an extraordinary achievement.

There is one theme that consistently emerges from these studies and reports. As human understanding of animal physiology and psychology has increased and as medical technology has become more refined, our understanding of the pain experienced by animals in the slaughter process has become more refined. And that understanding suggests that religious slaughter methods cause more pain and suffering to animals than conventional slaughter methods.

Despite this evidence, Lerner and Rabello conclude that the evidence as to the relative pain associated with ritual religious slaughter versus slaughter with stunning, is insufficient to support an argument that religious slaughter should be prohibited. The authors point out that 'virtually all Jewish authorities are firmly convinced that stunning might even cause more suffering to the animal'.⁷⁷

If there is insufficient scientific evidence to suggest that it is more probable than not that animals experience more pain and suffering as a result of religious slaughter methods, then are there other non-scientific countervailing reasons why those practices should be permitted?

2 Moral and Ethical Issues

Whether Commonwealth or state and territory governments should regulate the practices of religious slaughter of animals is an issue that can only be approached within the context of Australia's liberal democratic society.

Australian society is characterised as pluralistic and multicultural. Multicultural democratic societies attempt to accommodate a range of religious

74 Meat & Livestock Australia, above n 41, 32.

75 Ibid 37.

76 John Cottingham, "'A Brute to the Brutes?': Descartes Treatment of Animals' (1978) 53 *Philosophy* 551.

77 Lerner and Rabello, above n 59, 48.

and cultural practices, even to the point of tolerating the lifestyles and practices of minority groups that are completely foreign to the majority.

Earlier, it was noted that the animal slaughter practices of the majority of Australian abattoirs mandated by Commonwealth codes and standards that require stunning cannot be harmonised with the Jewish tradition and the tradition of some Muslims that require the religious ritual slaughter of un-stunned animals. This inconsistency sits uneasily within Australian society that is attempting to simultaneously improve the welfare of animals through progressive *Animal Welfare* legislation.

Australia has expressed a commitment to improving the welfare of animals. The *Australian Animal Welfare Strategy*, endorsed by the Primary Industries Ministerial Council, expressly provides:

All animals have intrinsic value. The Australian approach to animal welfare requires that animals under human care or influence are healthy, properly fed and comfortable and that efforts are made to improve their well-being and living conditions. In addition, there is a responsibility to ensure that animals which require veterinary treatment receive it and that if animals are to be destroyed, it is done humanely.⁷⁸

The growing recognition of the intrinsic value of animals is also reflected in the various state and territory animal welfare legislation that impose both positive and negative duties to care for animals. It is fair to say that one of the values that Australian society is seeking to develop is kindness in the way humans treat animals.

To what extent is ‘religious freedom’ an absolute value? Does a society’s commitment to religious tolerance justify practices that are cruel to animals? Is it possible for a claim of religious freedom to degenerate into licence to abuse animals? To what extent can society enact animal welfare legislation that functions as either a direct or indirect constraint on the free exercise of religion?

(a) A Statement of the Discussion

There are many ways in which to evaluate these issues and it is beyond the scope of this article to explore them all. This article approaches the issues by investigating the relationship between animal welfare interests and human interests in freedom of religious practice in an explicitly multicultural society. In this way, it is possible to ‘approach the problem of ritual slaughtering [by describing] it as a conflict between two rights-holders, the religious individuals and the animals that are being slaughtered’.⁷⁹

Further complicating a moral or ethical evaluation of religious slaughter practices is the recognition that the debate is not just about whether members of the Jewish or Muslim traditions can or cannot eat meat. Rather, it involves ‘the

78 Department of Agriculture, Fisheries and Forestry (Cth), above n 61, 18.

79 Lerner and Rabello, above n 59, 21.

actual freedom to perform *shechita* since *shechita* is not simply a way to provide permitted food, but a manifestation of a religious belief and a way of life'.⁸⁰

As in all Western democratic societies animals are not granted legal rights under the Australian legal framework; they have the legal status of property. Yet this legal characterisation as property sits uneasily with animals' undoubted sentience and capacity to feel pain and happiness.

Some European countries such as Germany and Switzerland have attempted to navigate this unease by recognising the inherent worth of animals in their Constitutions.⁸¹ However, even in those countries, animals are not accorded legal rights, and a Swiss proposal in 2010 to provide animals with rights of legal representation failed.

The source of this reluctance to endow animals with legally enforceable rights stems from the anthropocentrism that underpins Western liberal societies, with the accompanying view that it is the human person who stands at the centre of all considerations, that it is only human sufferings and preferences that must be taken into account, that it is only humans who are owed direct moral duties because humans are the only beings capable of higher cognitive processes and thus capable of asserting and responding to rights.

This distinction between humans and animals as rights holders is the product of a long line of ancient and contemporary thought about animals, the nature of rights and what it means to be a rights holder.

(b) *Cartesian Influences*

French philosopher René Descartes thought that animals were little more than inanimate objects without the capacity to think or feel pain. Descartes believed that the behaviour of animals did not need to be explained by theories of sentience and consciousness, but their behaviour could be explained by the simple mechanical functioning of their constituent parts:

that animals do better than humans do, does not prove that they are endowed with mind, for in this case, they would have more reason than any of us, and would surpass us in all other things. It rather shows that they have no reason at all and that it is nature which acts in them according to the disposition of their organs ...⁸²

Unlike humans, animals are not regarded as autonomous, self-reflective individuals with the capacity for self-determination. In particular, animals are incapable of accepting moral responsibilities and duties toward humans and other animals and therefore existed for the use of humans. As Steiner notes:

At bottom the legal treatment of animals in liberal traditions codifies an understanding and evaluation of animals as instrumentalities for the satisfaction of

80 Ibid 19–20; see also National Bioethics Committee, *Ritual Slaughter and Suffering* (2003) Italian National Commission on Bioethics, 6

<http://www.governo.it/bioetica/eng/opinions/Ritual_Slaughtering_and_Animal_Suffering_2_4.pdf>.

81 Article 20A of the German Constitution became effective on 1 August 2002, while Switzerland amended its Constitution in 1992. See Kate M Natrass, "... Und Die Tiere" Constitutional Protection for Germany's Animals' (2004) 10 *Animal Law* 283.

82 René Descartes, *Discourse on Method and Meditations on First Philosophy* (Yale University Press, 1996).

human needs. This modern legal conception of animals echoes Aristotle's view that animals exist expressly for the sake of human beings.⁸³

(c) *Kantian Influences*

In the eighteenth century Kant mitigated some of this apparent indifference to animals by arguing that although his categorical imperative did not apply to animals as moral subjects, nevertheless humans owed indirect duties toward animals. In his *Lectures on Ethics*, Kant explains that 'If man is not to stifle his human feelings, he must practice kindness towards animals, for he who is cruel to animals becomes hard also in his dealings with men.'⁸⁴

(d) *Bentham and Utilitarian Philosophy*

However, it was Bentham who finally recognised the importance of an animal's capacity to suffer pain.

A proponent of utilitarian philosophy Bentham argued that animals were capable of experiencing pleasure and pain and that it was therefore senseless to exclude animals from ethical consideration simply because they did not have the capacity for rational thought. In his famous work, *Introduction to the Principles of Morals and Legislation*,⁸⁵ Bentham suggested that the species to which a creature belongs is as irrelevant as race for ethical purposes and neither species nor race provided a valid reason to deprive a sentient being of a decent life.

(e) *Peter Singer's 'Preference Utilitarianism'*

Bentham's well-known follower, Australian philosopher Peter Singer initiated the contemporary debate concerning animal rights and animal welfare with his modified form of 'preference utilitarianism'.

Preference utilitarianism 'judges actions, not by their tendency to maximise pleasure or minimise pain, but by the extent to which they accord with the preferences of any being affected by the action or its consequences'.⁸⁶

Following Bentham, Singer holds that animals have an interest in avoiding pain and suffering and in experiencing happiness:

The capacity for suffering and enjoying things is a prerequisite for having interests at all. If a being suffers, there can be no moral justification for refusing to take that suffering into consideration If a being is not capable of suffering, or of experiencing enjoyment or happiness, there is nothing to be taken into account.⁸⁷

For Singer, the question would become: 'do the interests of religious practitioners in slaughtering animals outweigh the interests on the animals not to

83 Gary Steiner, 'Cosmic Holism and Obligations Toward Animals: A Challenge to Classical Liberalism' (2007) 2 *Journal of Animal Law and Ethics* 1, 2.

84 Immanuel Kant, *Duties to Animals and Spirits* in *Lectures on Ethics* (Louis Infield trans, Harper & Row, 1963) 239.

85 Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Methuen, first published 1789, 1982 ed).

86 Peter Singer, *Writings on an Ethical Life* (Fourth Estate Publishers (Harper Collins), 2002) 133.

87 Ibid.

feel the particular pain of that religious slaughter'? In answering this question, Singer may place it in the larger context of human desire to eat the flesh of animals.

(f) *Animal Rights – Tom Regan*

Other contemporary animal advocates go even further. In his influential 1988 text *The Case for Animal Rights*,⁸⁸ American philosopher Tom Regan critiques Peter Singer's utilitarian philosophy as inadequate to the task of protecting animals and their interests.

Instead, Regan holds that animals are 'subjects of a life' with interests of their own that matter as much to them as similar interests matter to humans. Regan would argue that as subjects of a life, animals should have inherent moral rights. For Regan, animals may not be slaughtered for food, whether for religious purposes or otherwise.

(g) *In Response – Animals Do Not Possess Rights*

However, not everyone thinks that animals should possess rights in the sense argued for by Tom Regan. For example, Schmahmann and Polacheck argue that it would 'be both implausible and dangerous to give or attribute legal rights to animals because such an extension of legal rights would have serious, detrimental impacts on human rights and freedoms'.⁸⁹

Cohen also disagrees with the approach taken by Tom Regan and others.⁹⁰ Cohen argues that rights holders must be able to distinguish between their own interests and what is right:

The holders of rights must have the capacity to comprehend rules of duty governing all, including themselves. In applying such rules (they) must recognize possible conflicts between what is in their own interest and what is just. Only in a community of beings capable of self-restricting moral judgements can the concept of a right be correctly invoked.⁹¹

Accordingly, Cohen argues that terms such as 'right' and 'wrong' mean nothing to animals that cannot create, articulate and enforce moral rights. These 'categories' of thought do not belong to the realm of animals.

Therefore, Cohen suggests that an animal has 'rights' is to fall into a category confusion; that is, the content of moral obligations is a category that applies solely to the human sphere of existence.⁹² These philosophers would argue that the human right to practice one's religion outweighs whatever interests animals may have.

88 Tom Regan, *The Case for Animal Rights* (Routledge Press, 1988).

89 David Schmahmann and Lori Polacheck, 'The Case against Rights for Animals' (1994–5) 22 *Boston College Environmental Affairs Law Review* 747, 749.

90 Carl Cohen and Tom Regan, *The Animal Rights Debate* (Rowman & Littlefield, 1st ed, 2001).

91 Carl Cohen, 'The Case for the Use of Animals in Biomedical Research' (1986) 315 *New England Journal of Medicine* 865, 866.

92 Cohen and Regan, above n 90, 30.

(h) *A Note of Caution*

At this point, one should sound a note of caution. Almost every element of the philosophy that underpins each school of thought can and has been criticised: ‘it takes little effort to turn up serious limitations in each of the ethical theories’.⁹³ It is easy to locate and criticise inconsistencies and difficulties in the arguments of advocates who would deny rights or interests to animals, as well as in the arguments of those who would advocate for the legal rights of animals.⁹⁴

What this discussion does suggest is that although there is a general movement in Western societies toward increased recognition of animal interests and welfare, there is no philosophical consensus that would support an argument that the interests of animals outweigh recognised human rights of freedom of religious practice.

For these reasons, I would argue that the first regulatory response, prohibiting the practice of the religious slaughter of animals is not likely to be a realistic response by Commonwealth, state or territory governments.

If direct attempts to prohibit the practice of religious slaughter of animals is unlikely to succeed, can governments attempt *indirect* regulation through food labelling laws?

V REGULATORY RESPONSE TWO – INDIRECT LABELLING LEGISLATION

If Commonwealth, state and territory governments take the view that attempting to ban these practices through legislation is too contentious, would it be better to leave some of the work to the market, by requiring that halal or kosher meat be specially labelled? Special labels would have the effect of distinguishing meat from animals slaughtered after stunning from meat produced from animals that have not been stunned before slaughtering.

This allows consumer sentiment and ethical choice to influence industry practice. It subtly shifts the emphasis of the argument from cruelty to animals, to issues concerning consumer rights. The question therefore modulates from: ‘[c]an the Jewish and Muslim communities legally slaughter according to their rites?’ to ‘[d]o consumers have the right, if they wish, not to buy and consume meat of animals resulting from non-stunned ritual slaughter?’⁹⁵

Characterised this way, future arguments about ritual slaughter are not likely to be fought explicitly between religious groups and animal advocates. Instead, the arguments are likely to be fought on the basis of consumer rights and consumer protection.

93 Ellen Goodman, ‘Book Review: Animal Ethics and the Law – A Review of Animal Rights: Current Debates and New Directions’ (2006) 79 *Temple Law Review* 1291, 1304.

94 Lerner and Rabello, above n 59, 24.

95 Bergeaud-Blackler, above n 20, 972.

This approach comes with its own set of complexities. On the one hand, legally requiring halal and/or kosher meat to be labelled would differentiate this type of meat from other forms of meat. Could this be construed as a form of religious discrimination? On the other hand, why should consumers not be entitled to exercise free, ethical choices when purchasing meat? This matter has caused heated debate in Europe and the United Kingdom and is a debate to be navigated and negotiated by the Australian government in the near future.

A Halal and Kosher Meat in General Circulation

In both Europe and the United Kingdom, halal and kosher meat has found its way into general consumer circulation.

In June 2003, the UK Farm Animal Welfare Council ('FAWC') published its *Report on the Welfare of Farmed Animals at Slaughter or Killing, Part 1: Red Meat Animals* and outlined the following concern:

During our consultations concern was expressed to us about meat from animals slaughtered without pre-stunning (including meat from the hindquarters of some animals and meat from rejected animals) being placed, unidentified, on the open market rather than being consumed by the Jewish community. As a result, larger numbers of animals are slaughtered without pre-stunning than would be necessary if all carcasses, and the entire carcase were acceptable.⁹⁶

In September 2010, a media investigation revealed that schools, hospitals, hotels and some famous sporting venues such as Ascot and Wembley were routinely serving halal and kosher meat to the general public.⁹⁷ This investigation ignited fierce public debate. As a result of this investigation, the UK House of Commons, Science and Environment Section produced a 'Standard Note' to Members of Parliament detailing further examples of the general distribution of halal and kosher meat.⁹⁸

B European Union Labelling Initiatives

The issue of labelling meat from animals slaughtered by halal or kosher methods was also of significant concern to the European Parliament. In June 2010, the European Parliament voted on new food labelling laws. *On the Proposal for a Regulation of the European Parliament and of the Council on the Provision of Food Information to Consumers* ('EU Resolution') contained Amendment 205⁹⁹ which required that meat and meat products derived from

96 Farm Animal Welfare Council, *Report on the Welfare of Farmed Animals at Slaughter or Killing Part 1: Red Meat Animals* (June 2003) Defra Publications, 33 [183] <<http://www.fawc.org.uk/reports/pb8347.pdf>>.

97 Simon McGee and Martin Delgado, 'Britain Goes Halal... but No-One Tells the Public: How Famous Institutions Serve Ritually Slaughtered Meat with No Warning', *Mail on Sunday* (online), 19 September 2010 <<http://www.dailymail.co.uk/news/article-1313303/Britain-goes-halal--tells-public.html>>.

98 Christopher Barclay, 'Religious Slaughter' (Science and Environment Standard Note No SN/SC/1314, House of Commons Library, UK Parliament, 2 December 2010).

99 *On the Proposal for a Regulation of the European Parliament and of the Council on the Provision of Food Information to Consumers* (16 June 2010) European Parliament <<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2010-0109&language=EN>>.

animals that have been ritually slaughtered, without prior stunning, must be labelled as such.

The stated intention behind Amendment 205 was:

EU legislation permits animals to be slaughtered without prior stunning to provide food for certain religious communities. A proportion of this meat is not sold to Muslims or Jews but is placed on the general market and can be unwittingly purchased by consumers who do not wish to buy meat derived from animals that have not been stunned. At the same time, however, adherents of certain religions specifically seek meat from animals which have been ritually slaughtered. Accordingly, consumers should be informed that certain meat is derived from animals which have not been stunned. This will enable them to make an informed choice in accordance with their ethical concerns.¹⁰⁰

What was at issue was labelling, not the ability of European Union member states to slaughter animals for religious purposes without stunning. Article 18 of EC Directive No 1099/2009 (24 September 2009) recognises that:

Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union.¹⁰¹

European Jewish and Islamic Groups initiated a well-organised campaign against Amendment 205 alleging that it discriminated against religious practice as part of a 'pan-European bias against Islam'.¹⁰² The campaign was initially successful and at its 7 December 2010 meeting the EU Council of Ministers rejected it.¹⁰³

However, the debate continues with the European Parliament Committee on the Environment, Public Health and Food Safety voting on 19 April 2011 for amendments to the EU *Regulation on the Provision of Food Information to Consumers*.

Amendments 359, 353 and 354 require meat products from animals slaughtered without prior stunning or slaughtered by halal or *shechita* methods to be labelled as such.¹⁰⁴ These recommendations of the Committee on the

¹⁰⁰ Ibid.

¹⁰¹ *Council Regulation (EC) No 1099/2009 of 24 September 2009 on the Protection of Animals at the Time of Killing* [1999] OJ L 303/1.

¹⁰² David Sapsted, 'New EU Labels for Halal and Kosher Foods Spark Anger', *The National* (online), 26 December 2010 <<http://www.thenational.ae/news/worldwide/europe/new-eu-labels-for-halal-and-kosher-foods-spark-anger>>.

¹⁰³ Council of the European Union, 'Council Agrees on New Labelling Rules for Food' (Press Release, 17391/10, 7 December 2010) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/118258.pdf>.

¹⁰⁴ Committee on the Environment, Public Health and Food Safety, European Parliament, *Amendments 108–402: Proposal for the Provision of Food Information to Consumers* (Doc No 17602/1/2010 – C7-0060/2011 – 2008/0028(COD)) (23 April 2011).

Environment, Public Health and Food Safety amendments will be voted on by the European Parliament in its July 2011 sittings.

C Australian Commonwealth Government Labelling Initiatives

In Australia, a major federal government review is underway into food labelling laws. On 23 October 2009, the Council of Australian Governments ('COAG') and the Australia and New Zealand Food Regulation Ministerial Council ('Ministerial Council') agreed to undertake a comprehensive review of food labelling law and policy. After the first round of consultations and after receiving over 6000 public submissions, the Review Panel issued its *Issues Consultation Paper* on 5 March 2010 ('*Consultation Paper*') and invited further submissions.¹⁰⁵

Question 17 of the *Consultation Paper* asks whether 'there is a need to establish agreed definitions of terms such as "natural", "lite", "organic", "free range", "virgin" (as regards olive oil), "kosher" or "halal"? If so, should these definitions be included or referenced in the Food Standards Code?'¹⁰⁶

The Review Panel's report *Labelling Logic* released in January 2011 concluded:

Halal and Kosher are two religiously based specific consumer values claims relating to food preparation and production processes. At this time, alert and informed communities and monitoring by authoritative religious bodies appear to provide the discipline necessary for effective self-regulation. Additional regulation may be considered in the future if monitoring indicates that this self-regulatory approach is ineffective.¹⁰⁷

The correct labelling of meat that is produced from animals slaughtered according to either halal or kosher methods is therefore left to industry participants themselves. While the producers may label meat as such, what about the retailers to whom they supply the meat?

Given the experience in both the UK and Europe, is there evidence that halal or kosher meat has found its way into general circulation in Australia? Recent media investigations suggest that this is the case.¹⁰⁸ If so, should consumers have the right to be able to choose meat from animals slaughtered according to halal or kosher methods as distinct from meat from animals slaughtered in more humane ways? The Federal Government's 2011 *Labelling Logic* report does not address this issue. What about state and territory labelling laws?

D New South Wales Meat Labelling Legislation

Apart from the Federal Review of food labelling laws, the New South Wales Government enacted a more specific form of labelling law, the *Food Amendment*

105 Food Labelling Law and Policy Review Panel (Cth), *Issues Consultation Paper: Food Labelling Law and Policy Review* (2010).

106 Ibid 6.

107 Food Labelling Law and Policy Review Panel (Cth), *Labelling Logic: Review of Food Labelling Law and Policy* (2011) 105 [6.27].

108 Seven Network, 'Halal Chicken', *Today Tonight*, 28 January 2011.

(*Beef Labelling*) Act 2009 (NSW) ('*NSW Food Amendment Act*'), which came into effect from 31 August 2010. The *NSW Food Amendment Act* is intended to be 'a 'truth in labelling' initiative and not a meat grading scheme. Introducing standard beef descriptions is intended to 'help consumers know more about the beef they're buying'.¹⁰⁹

Regulations that have been issued pursuant to section 23A of the *NSW Food Amendment Act* prescribe the AUS-MEAT Domestic Retail Beef Register ('AUS-MEAT Register') for the purposes of beef labelling requirements. A person who does not comply with the requirements of the AUS-MEAT Register or, who does so inconsistently, engages in misleading or deceptive conduct in breach of section 23B of the *NSW Food Amendment Act*.

1 *Incorporation of the AUS-MEAT Register*

AUS-MEAT Limited is a joint venture company created by Meat and Livestock Australia and the Australian Meat Processor Corporation. It is therefore an industry-owned corporation. The AUS-MEAT Register establishes minimum mandatory descriptions for the labelling of beef products that are to be supplied into the retail market. This includes beef from animals that have been slaughtered pursuant to ritual slaughter. Clause 5.3 of the AUS-MEAT Register provides:¹¹⁰

Where Beef product is advertised, packaged or labelled as being Halal or Kosher, a retail business must substantiate, where applicable, that beef products to which the claim applies are derived from products that have been processed in accordance with the appropriate ritual slaughter procedure as set out in the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption* (AS 4696:2007).

Under the AUS-MEAT Register, there is no *general* requirement for beef processors to distinguish between beef that has been slaughtered for halal or kosher purposes. However, where a beef processor does sell beef alleged to be ritually slaughtered according to halal or kosher religious rituals, that processor must substantiate that claim.

It is important to note that clause 5.3 of the AUS-MEAT Register requires a beef processor not just to substantiate that animals have been slaughtered for halal or kosher purposes, but that the animal has been slaughtered 'in accordance with the appropriate ritual slaughter procedure as set out in the *Australian Standard for the Hygienic Production & Transportation of Meat and Meat Products for Human Consumption* (AS 4696:2007)'.¹¹⁰

Two circumstances reveal the ambiguity of clause 5.3. Firstly, what is the situation where there is a failure to label meat in a way that informs consumers and enables consumers to make an informed choice about the meat they

109 NSW Food Authority, *General Circular 09/2010* (1 December 2010) 2 <http://www.foodauthority.nsw.gov.au/_Documents/industry_pdf/GeneralCircular-092010-beef-labelling%20.pdf>.

110 AUS-MEAT, *Domestic Retail Beef Register* (3rd ed, 19 May 2011) 9, cl 5.3 <<http://www.ausmeat.com.au/industry-standards/domestic-retail-beef-register.aspx>>.

purchase? And secondly, what is the situation where an abattoir has an ‘approved arrangement’ to slaughter animals without stunning them? Does this departure require noting on the label?

Would either of these situations amount to misleading or deceptive conduct in breach of section 23B of the *NSW Food Amendment Act 2010*? It is well established that silence – that is, failure to inform – can amount to misleading or deceptive conduct.¹¹¹ It follows that such situations might also give rise to misleading or deceptive conduct, in breach of section 18 of schedule 2 of the *Competition and Consumer Act 2010* (Cth).¹¹²

Notwithstanding the experience in the European Union, Commonwealth and state meat labelling initiatives are a more realistic regulatory response to the practice of the religious slaughter of animals. Labelling initiatives shift the emphasis of the debate away from the outright prohibition of religious slaughter. In doing so, the issues at stake go beyond human rights versus animal rights and freedom of religious practice versus animal welfare.

Rather, the emphasis shifts to one of consumer choice. Religious slaughter of animals may continue, but labelling initiatives will enable consumers to make an informed choice about the meat products they choose to buy.

VI CONCLUSION

In this article, I explored some of the difficult legal, religious and philosophical issues associated with attempts to regulate the practice of the religious ritual slaughter of animals. It is an issue that Australia has yet to adequately address despite the apparently confused state of regulation of the practice. While this regulatory confusion prompted past Federal Agricultural Ministers to investigate the regulation of religious slaughter of animals, little has been done to bring clarity to the issue.

In light of this I have considered two possible regulatory responses that might be possible in an eventual government response; (a) the elimination of the practice of religious slaughter of animals and (b) food labelling initiatives intended to inform consumers that meat may have been produced from animals slaughtered according to religious rituals.

These responses were evaluated in light of the Australian constitutional and statutory framework protecting freedom of religion and religious practice and in light of the difficult experiences of similar regulatory initiatives in the European Union and New Zealand. As these attempts were defeated in the European Union and New Zealand on religious grounds, the article explored the religious justification for the ritual slaughter of animals, including the scientific debate about the extent to which animals feel pain during the slaughter process.

111 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.

112 *Competition and Consumer Act 2010* (Cth), sch 2, s 18.

Despite recent and more sophisticated scientific studies suggesting that animals experience more pain when slaughtered by religious ritual, it is very unlikely that the government would successfully prohibit the practice by direct legislative means. Although Western societies are growing in their concern about the treatment of animal interests and welfare, there is no philosophical consensus attributing rights to animals that would outweigh recognised human rights claims of freedom of religious practice.

It is for this reason that the second regulatory response - meat labelling laws - is most likely to succeed. This is because labelling initiatives shift the emphasis of the debate away from arguments about well established human rights claims versus uncertain animal rights and freedom of religious practice versus animal welfare to one of consumer choice. Religious slaughter of animals may continue, but labelling initiatives will enable consumers to make an informed choice about the meat products they choose to buy.

My own view acknowledges growing public concern to protect the welfare of animals and to reduce animal suffering. I believe that the more recent scientific studies discussed earlier provide compelling evidence supporting the conclusion that the religious ritual slaughter of animals causes a greater degree of suffering than slaughter after stunning. At the very least, the recent scientific research discussed earlier casts reasonable doubt on the proposition that slaughtering animals without prior stunning is painless. And where reasonable doubt exists, the issue should be resolved in favour of animal welfare.

Accordingly, I do not believe that claims of freedom of religion should therefore shield practices from animal cruelty laws that are intended to have general applicability. In this sense I agree with Sadow who concludes:¹¹³

Freedom of religion can no longer support claims for exemption from animal anti-cruelty laws that clearly have general applicability. Such laws are enacted to satisfy our moral inclination that sentient beings have a right to be free from physical abuse. It strongly undermines our sense of morals to exempt groups of individuals from laws with such purposes in the name of religious freedom. Holding ideas more important than the right of a living feeling thing to be free from immense suffering is fundamentally dangerous.

113 Tali Shaddow, 'Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology' (1990-1991) 24 *Loyola of Los Angeles Law Review* 1367, 1395.